

COMPLIANCE BOARD OPINION NO. 99-18

November 4, 1999

Mary R. Craig, Esquire

The Open Meetings Compliance Board has considered your complaint that the Hagerstown City Council violated the Open Meetings Act by failing to have written, approved minutes of its meetings prepared for approximately 120 meetings.

For the reasons set forth below, the Compliance Board finds that the City Council violated the Act's requirement that it prepare written minutes as soon as practicable. The Compliance Board is pleased to note, however, that the City is taking steps to correct the violation.

I

Complaint and Response

In your complaint, you stated that the Mayor and City Council meet in public session approximately four times a month, including work sessions. As of November 29, 1998, it was determined by your client, the Herald-Mail, that no written, approved minutes had been prepared for at least 33 months. Since November 1997, only two or three months of written minutes were available, and no written minutes had been prepared since February 1999. Thus, the Herald-Mail estimated, no minutes exist for at least 120 meetings held by the Mayor and City Council.

In a timely response on behalf of the Mayor and City Council, Mark K. Boyer, Esquire, denied that the Act had been violated. Citing §10-509 of the State Government Article, Mr. Boyer asserted that the Open Meetings Act does not prescribe the precise form that minutes must take. Mr. Boyer pointed out that the City prepares and maintains typewritten notes and audiotapes of all meetings prior to the preparation of formal minutes. Additionally, a formal copy of every action taken by the Council, whether by ordinance or resolution, is on file in the City Clerk's office for inspection by the public. Mr. Boyer maintained that these activities, considered in light of the limited staffing and increasing workload in the Clerk's Office, sufficiently complied with the City's obligation under §10-509.

As part of the City's response, Mr. Boyer indicated that, for the most part, minutes are available for meetings held prior to January 1996. However, minutes were unavailable for ten meetings held in 1988 and for two meetings held in 1995. Minutes were also unavailable for more than 50 regular and special meetings held from January 1996 through the middle of this year. In addition, minutes were not prepared for many "work sessions" of the Council. Mr. Boyer also reported on the City's efforts to keep current with minutes and to deal with the backlog:

Formal minutes do exist for 25 meetings (17 Regular Sessions and 8 Special Sessions) held between 1996 and early 1999, and minutes have been prepared from July 1, 1999 through the present for all Regular Sessions, Special Sessions and Work Sessions.... The City staff is diligently working on the backlog and, it is anticipated that minutes of all Regular and Special Sessions held in calendar year 1999 will be prepared within the next several weeks.

Indeed, in a letter dated October 21, 1999, Mr. Boyer informed us that "minutes have been prepared for all Regular and Special Sessions held from 1995 through September 28, 1999...."

II

The Act's Requirements for Preparation of Minutes

A. Introduction

In §10-509(b), the Open Meetings Act requires that, "As soon as practicable after a public body meets, it shall have written minutes of its session prepared." While the Act does not define "as soon as practicable," we have said that the "practicability" standard recognizes the fact that minutes cannot be made available instantaneously. For example, the Act permits a public body to take a reasonable amount of time to review draft minutes for accuracy and to approve the minutes. *See* Compliance Board Opinion 98-3 (May 12, 1998). Thus, the Act allows practical circumstances to be considered and does not impose a rigid time limit. *See State v. Peterson*, 315 Md. 73, 534 A.2d 1353 (1989) ("[t]he words 'whenever practicable' or 'as practicable' are of a relative and dependent character, to be controlled more or less by the circumstances of the case, and by no means furnish a definite and fixed rule") (quoting *Lankford v. Somerset County*, 73 Md. 105, 113-114, 20 A. 1017 (1890)).

The absence of a specific time limit, however, does not suggest that a public body is free to take as much time as it wants. The phrase “as soon as practicable” means “within a reasonable time.” *CPC Intern, Inc. v. Aerojet-General Corp.*, 825 F. Supp. 795, 813 (W.D. Mich. 1993). An excessive delay is inconsistent with the public’s right under §10-509(d) to inspect the minutes of open meetings.

B. Timing

The oldest meetings for which minutes are unavailable were held in 1988. No reason appears in the City’s response for the absence of minutes, nor does the City suggest that they once existed but now cannot be located. Obviously, the failure to prepare minutes for more than a decade cannot be justified. While the Compliance Board understands that the current administration may not be aware of the reason for the lack of minutes for meetings held so long ago and may not be able to rectify the problem, nevertheless, the absence of these minutes is a violation of the Act.¹ The same can be said of the delay in preparing minutes for the two meetings held in 1995. A delay of more than four years does not meet the standard of “as soon as practicable” and is a violation of the Act.

More recent meetings potentially pose a difficult exercise in applying the Act’s “practicability” standard. Rather than attempting to dissect the chronology of the Council’s more recent meetings, and in light of the City’s recent effort to rectify the situation, the Compliance Board offers the following general guidance: First, unless the Act does not apply to a meeting because of the “executive function” exclusion, minutes are required no matter what the meeting is called. Minutes are required for work sessions, just as they are for regular and special meetings.

Second, neither the Council nor any other public body may tolerate routine delays of several months or longer in preparing minutes. The cycle of minutes preparation should parallel the cycle of a public body’s meetings, with only the lag time needed to draft and review minutes. Although temporary staffing shortages or special circumstances (a key employee’s illness, for example) can be an acceptable reason for a delay in minutes, a public body may not justify a failure to prepare timely minutes by pointing to limited staff time or competing priorities. A public body must allocate the staff time needed to comply with the Act.

¹ The relevant provision of the Act, §10-509(b), was the same in 1988 as today. It is possible that some of these meetings might have been devoted solely to “executive function” matters excluded from the Act. If so, the Act’s requirements about minutes did not apply to those minutes. It is inconceivable, however, that *all* of the meetings were excluded from the Act, and the City does not so contend.

C. *Format*

It has evidently been the Council's practice to provide access to audiotapes and, in some instances since April 1998, typewritten notes of its meetings, prior to the preparation of its official written minutes. In its response, the City stated that, although the Act spells out what must be contained in the minutes, it does not prescribe the precise form that minutes must take. Therefore, the City concluded, despite the fact that they are not in final form and do not carry the official heading "minutes," the typewritten notes and audiotapes of the Council meetings satisfy the content requirements of the Act for minutes.

The Act provides in §10-509(b) that, "[a]s soon as practicable after a public body meets, it shall have *written* minutes of its session prepared." (Emphasis added.) The main purpose of this requirement is to ensure that members of the public who did not attend a meeting can learn in an organized, precise manner of what occurred. *See* Compliance Board Opinion 98-3 (May 12, 1998). While an audiotape may allow members of the public to hear what occurred at the meeting, it also may present problems: difficulty understanding or comprehending what the items of business are, how a member of the public body voted, or which member made a particular motion. The written minutes record this information in a more efficient format for the public and is the method chosen by the Legislature to help ensure the accountability of government to the citizens. Thus, the City's preparation and maintenance of audiotapes to serve as official "minutes" of its meetings did not satisfy the requirements of §10-509(b).² On the other hand, the typewritten notes might have satisfied the Act's requirements if the notes reflected each item considered, action taken on each item, and each vote. *See* §10-509(c).

² The Act does not address the status of tapes of open meetings, and the Compliance Board does not comment on the practice of furnishing audiotapes of open meetings to the public prior to the adoption of official minutes. However, if a public body chooses to make recordings of its open meetings, those recordings would be available to the public under the Maryland Public Information Act. Should a public body choose to prepare a written transcript based on a tape, that transcript would be ample compliance with §10-509. *See* Compliance Board Opinion 96-4 (May 1, 1996).

III**Conclusion**

The Compliance Board finds that the City Council violated the Act by failing for many years to provide written minutes in a timely manner. The City's recent effort to prepare minutes for past meetings is commendable, and the Compliance Board expects the City to carry forward its ongoing process for timely preparation of minutes that meet the Act's requirements.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.

Courtney McKeldin

Tyler G. Webb